83-833

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL B. LORENZETTI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a federal employee who has received Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment is obligated by 5 U.S.C. 8132 to reimburse the United States out of damages recovered from a negligent third party when a state no-fault automobile insurance statute allows such tort recovery for pain and suffering but not for medical expenses and lost wages.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 710 F.2d 982. The opinion of the district court (App. C, *infra*, 13a-18a) is reported at 550 F. Supp. 997.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory and regulatory provisions are reproduced in App. E, *infra*, 20a-25a.

STATEMENT

1. a. The Federal Employees' Compensation Act (FECA, or the Act), 5 U.S.C. 8101 *et seq.*, establishes a comprehensive program of benefits for government employees injured in work-related accidents. If an employee is injured "while in the performance of his duty" (5 U.S.C. 8102(a)), he is entitled to compensation for expenses of medical and related services (5 U.S.C. 8103, 8111) and vocational rehabilitation (5 U.S.C. 8104) and for a percentage of his lost wages (5 U.S.C. 8105-8107, 8110). Benefits may be paid to an employee's survivors in the case of death (5 U.S.C. 8133, 8134). The FECA was designed to give injured federal employees a speedy and certain recovery for work-related injuries, regardless of fault or contributory negligence and without the need for litigation or expense. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 4; *Johansen* v. *United States*, 343 U.S. 427, 439-441 (1952); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

The FECA provides that the government is entitled to receive reimbursement for benefits paid in connection with an injury if an employee succeeds in recovering from a third-party tortfeasor. When an employee receives FECA benefits for an injury "creating a legal liability in a person other than the United States to pay damages," the Secretary of Labor may require the employee to bring a third-party action or assign the cause of action to the United States (5 U.S.C. 8131(a)). If the action is assigned to the United States, the Secretary may prosecute or compromise the action, and any recovery must first satisfy the FECA compensation fund

for the amount of benefits already paid to the employee. However, the Act provides that the employee must receive at least one-fifth of the net amount of the settlement or recovery (after deduction of the costs of settlement or recovery). 5 U.S.C. 8131(c). If the employee refuses to assign or prosecute his cause of action, he is not entitled to receive FECA compensation (5 U.S.C. 8131(b)).

If the employee himself receives "money or other property" in satisfaction of the legal liability of a third party to pay damages, he may deduct the cost of recovery, including a reasonable attorney's fee, and may retain one-fifth of the net amount. Following those deductions, the employee must reimburse the FECA compensation fund for any FECA benefits already paid to him and must credit the surplus to future compensation payments for the same injury. 5 U.S.C. 8132. The Act provides that "[n]o court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States" (*ibid.*). Pursuant to 5 U.S.C. 8149, the delegation of rulemaking authority to the Secretary of Labor, the Secretary has promulgated 20 C.F.R. 10.503, which sets out procedures for reimbursement of the FECA compensation fund from third-party recoveries.

b. The Pennsylvania No-Fault Motor Vehicle Insurance Act (No-Fault Act), Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983), became effective in 1975. The primary purpose of the No-Fault Act is to provide, at reasonable cost, prompt and adequate basic loss benefits to victims of motor vehicle accidents and their survivors. See *id.* § 1009.102(b). To accomplish this goal, the No-Fault Act provides for the payment of benefits for basic economic losses on a first-party basis, *i.e.*, an accident victim's own insurance

company pays for basic losses (including an unlimited amount of medical expenses and lost wages up to $15,000), regardless of fault (*id.* §§ 1009.104, 1009.106, 1009.202). The No-Fault Act defines "basic loss benefits" that must be paid by the no-fault insurer as "net loss sustained by a victim, subject to any applicable limitation [or] exclusions * * *" (*id.* § 1009.103). In computing "net loss" a no-fault insurer may deduct any government benefits, including workers' compensation, that the victim receives or is entitled to receive because of his injury, "unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act * * *" (*id.* § 1009.206(a)). Thus, a no-fault insurer in Pennsylvania is not required to pay benefits for losses that also are covered by a program such as the FECA.

The No-Fault Act partially abolishes tort liability for injuries in Pennsylvania that arise out of the use and maintenance of a motor vehicle. A victim may not obtain a tort recovery for economic losses (*e.g.*, medical expenses and lost wages), except to the extent they are not compensated because they exceed statutory no-fault coverage limits. Pa. Stat. Ann. tit. 40, § 1009.301(a)(4) (Purdon Cum. Supp. 1983). Thus, a tortfeasor is not liable for medical expenses or the first $15,000 in lost wages, since the No-Fault Act requires the no-fault insurer to pay all such expenses; however, a tortfeasor would be liable for any lost wages over and above the $15,000 statutory ceiling on no-fault coverage for that category of loss. A tortfeasor remains liable for damages for noneconomic losses (*e.g.*, pain and suffering) if an accident results in death or serious and permanent injury, if the reasonable value of necessary medical and dental services exceeds $750, or if the victim is disabled for more than 60 days or suffers serious and permanent disfigurement (*id.* § 1009.301(a)(5)).

2. Respondent is a special agent for the Federal Bureau of Investigation. He was injured in Pennsylvania in November 1977 when the automobile he was driving was struck by another vehicle. At the time of the accident, respondent was performing duties in the scope of his employment. Accordingly, he received FECA benefits covering his medical expenses and a percentage of his lost wages. App. A, *infra*, 2a.

In 1979 respondent filed a tort action in the Court of Common Pleas of Philadelphia County against the driver of the vehicle that had struck his automobile. Based on the FECA benefits it had paid, the federal government asserted a subrogation lien against any recovery by respondent. The driver of the other vehicle moved to exclude proof of medical expenses and lost wages, on the ground that, under the terms of the No-Fault Act, damages for such losses may not be recovered from a tortfeasor. The Court of Common Pleas agreed that respondent should not be permitted to prove such amounts, including $1,600.24 paid by the United States in the form of FECA benefits. Respondent ultimately settled the tort action for $8,500. The settlement figure represented compensation only for noneconomic losses, *i.e.*, pain and suffering. App. A, *infra*, 6a; App. C, *infra*, 14a.

Pursuant to 5 U.S.C. 8132, the United States asserted its right to be reimbursed from respondent's settlement in the amount of the FECA benefits he had received.[1] Respondent then filed this declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania to prevent the government from recovering the amount of the FECA ben-

[1] The district court stated that the government actually claimed only $1,044.38, following deduction of an attorney's fee from total benefits of $1,600.24, pursuant to 5 U.S.C. 8132 (App. C, *infra*, 13a n.1). In fact, the figure of $1,600.24 already reflects the deduction of an attorney's fee.

efits. Respondent contended that because the No-Fault Act precluded him from recovering damages for medical expenses and lost wages from the tortfeasor, the government should not be permitted to obtain reimbursement for the benefits it had paid to compensate for such losses.

3. The district court granted summary judgment for the United States. The court held that the government was entitled to seek reimbursement from respondent's third-party tort recovery, even though that recovery represented compensation only for his noneconomic losses, not for his medical expenses and lost wages. App. C, *infra*, 13a-18a. In concluding that all third-party recoveries give rise to a duty to reimburse the government, the district court relied in large part on the decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (6th Cir. 1981), which involved the identical issue in the context of the Michigan no-fault statute. The Sixth Circuit held in *Ostrowski* that the FECA unambiguously subjects all damages recovered from third parties to the obligation to reimburse the FECA compensation fund.

4. The court of appeals reversed (App. A, *infra*, 1a-11a), expressly rejecting the Sixth Circuit's decision in *Ostrowski* (App. A, *infra*, 5a). The court of appeals recognized that one of the primary purposes of the FECA reimbursement provision was to reduce the costs of the compensation program (*ibid.*). It concluded, however, that requiring reimbursement in cases in which an employee could not recover tort damages for medical expenses and lost wages would be "manifestly unfair" to federal employees who are subject to state no-fault statutes (*id.* at 7a). The court also concluded that reimbursement in such circumstances would not serve to prevent double recovery or to foster ease of administration and would be inconsistent with

Congress's perceived intent to make the federal government a "model employer" (*id.* at 8a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning interpretation and administration of the Federal Employees' Compensation Act in states that have no-fault automobile insurance schemes. The court of appeals has held that a state no-fault statute eliminating tort liability for medical expenses and lost wages abrogates the obligation of a federal employee who obtains a third-party tort recovery to reimburse the federal government for FECA benefits he has received. The effect of that holding is to read the reimbursement provision, 5 U.S.C. 8132, out of the Act in an entire class of cases.

The court of appeals' decision is contrary to both the plain language of the FECA and the consistent interpretation of the Secretary of Labor. Unless reversed, the decision below will impose a substantial unwarranted drain on the FECA compensation fund and will generate administrative difficulties and considerable litigation for the Secretary. Moreover, the court of appeals' interpretation of the FECA conflicts with a decision of the Sixth Circuit. Review by this Court is plainly warranted.

1. The decision of the court of appeals conflicts with the Sixth Circuit's decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (1981). In *Ostrowski* the Sixth Circuit held that the FECA requires that a federal employee reimburse the United States from his third-party tort recovery, despite the fact that (because of the limitation of tort liability imposed by the Michigan no-fault statute) the tort recovery did not include damages for economic losses covered by the FECA benefits he had received.[2] The district court opinion in

[2] The Michigan statute resembles the Pennsylvania statute in the key respect pertinent to this case; it eliminates tort liability

Ostrowski, on which the Sixth Circuit relied in large part, explained that a construction of 5 U.S.C. 8132 that would immunize the third-party recovery from the duty to reimburse "contradicts the plain language of the statute, the plain language of the regulations adopted to administer and enforce the statute, analogous case law, and the congressional purpose in enacting Section 8132, which was to reduce the cost of providing benefits under the Act by maximizing the amount of reimbursements while minimizing the costs of administering FECA." *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. 200, 203 (E.D. Mich. 1979). The Sixth Circuit noted in addition that the Secretary's regulation providing that the employee may retain a minimum of one-fifth of his net tort recovery, 20 C.F.R. 10.503, was designed to prevent injustice to federal employees in cases in which FECA reimbursement otherwise would wipe out the tort recovery. 653 F.2d at 230-231.

The court of appeals in this case recognized the relevance of *Ostrowski*, but squarely rejected its holding (App. A, *infra*, 5a). This conflict creates serious practical problems for the Secretary of Labor, who is charged with administration of the FECA. The conflict makes it impossible to administer uniformly the reimbursement provisions of the Act. Federal employees within the Sixth Circuit must reimburse the FECA compensation fund from their third-party tort recoveries, regardless of the operation of any no-fault statute, while federal employees within the Third Circuit may reduce or eliminate their duty to reimburse the fund by pleading the effect of a no-fault statute.

Even apart from the conflict among the circuits, the decision below is certain to produce confusion in the ad-

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for all medical expenses and for some lost wages (up to a ceiling amount) arising from use or maintenance of a motor vehicle within the state. Mich. Stat. Ann. § 24.13135 (Callaghan 1982) (Mich. Comp. Laws § 500.3135).

ministration of the FECA program and to precipitate further litigation. Sixteen states currently have some form of full-fledged no-fault recovery scheme for automobile accidents.[3] Each no-fault state has its own peculiar no-fault scheme; moreover, it is not unusual for states to amend their no-fault laws, and additional states may enact no-fault statutes in the future.[4] The Secretary would be required to study the statutory scheme and developing case law in each no-fault state in order to determine how they affect the federal government's right to reimbursement under the FECA in that state. For example, within the Third Circuit, New Jersey, like Pennsylvania, is a no-fault state. But the no-fault statutes of the two states differ in various respects, and it is unclear whether the court of appeals would conclude that the FECA should be construed to bar reimbursement of the United States in the case of automobile accidents in New Jersey.[5] As a result, the

[3] Our review of state statutes indicates that the following jurisdictions have mandatory no-fault automobile insurance schemes under which tort liability is limited in certain respects: Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah.

[4] We are advised that the Governor of New Jersey recently signed several bills significantly amending that state's no-fault statute. The District of Columbia no-fault statute went into effect earlier this year. D.C. Code Ann. §§ 35-2101 *et seq.* (Cum. Supp. 1983).

[5] The New Jersey statute does not provide expressly for broad abolition of tort liability, as does the Pennsylvania statute. However, it includes a provision that evidence of amounts collectible or paid under no-fault coverage is inadmissible in a civil action for recovery of damages for bodily injury by an injured person. N.J. Stat. Ann. § 39:6A-12 (West 1976). The New Jersey Supreme Court has held that this provision prevents the injured person from recovering from a tortfeasor for amounts collectible or paid under the no-fault program and that the no-fault insurer may not be subrogated with respect to those

government might be obliged to litigate the issue not simply on a circuit-by-circuit basis, but on a state-by-state basis within each circuit.[6] This result is intolerable as applied to a nationwide federal program affecting almost three million persons.

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amounts. *Aetna Insurance Co.* v. *Gilchrist Brothers, Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981). It is unclear whether the New Jersey courts would reach a similar conclusion in a case in which an employee had received workers' compensation benefits. Cf. *Sanner* v. *Government Employees Insurance Co.*, 150 N.J. Super. 488, 491, 494-495, 376 A.2d 180 (App. Div. 1977) (per curiam), aff'd, 75 N.J. 460, 383 A.2d 429 (1978) (per curiam) (dictum suggesting that the federal government could pursue a subrogation right against the tortfeasor to recoup benefits paid to military personnel under the Medical Care Recovery Act). Recent amendments to the New Jersey no-fault statute further complicate the task of determining how the court of appeals would apply the decision below in the case of an automobile accident in New Jersey.

It is unclear whether the court of appeals' decision would affect the interpretation of the FECA in connection with an automobile accident in Delaware. Although Delaware has what is sometimes referred to as a no-fault statute, Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1982), it is generally viewed as having retained the traditional tort system of recovery. See *Burke* v. *Elliott*, 606 F.2d 375, 377 (3d Cir. 1979). But see Del. Code Ann. tit. 21, § 2118(g) (Cum. Supp. 1982) (any person eligible for no-fault benefits may not plead in an action for damages against a tortfeasor those damages for which benefits are available, whether or not such benefits are actually recoverable).

[6] Michigan and Kentucky are within the Sixth Circuit and thus presumably would be governed by the *Ostrowski* decision. Other states might be unaffected by the rationale of the court of appeals' decision in this case because of the manner in which the state courts have construed their no-fault statute. However, we believe further litigation would be necessary in most no-fault states before this could be determined with any certainty.

Other states that have partial no-fault systems, such as Delaware, might be affected by the court of appeals' decision, depending on the features included in the statute in question. See note 5, *supra*.

The court of appeals' decision will have a substantial impact on the federal Treasury. The Department of Labor informs us that there are now 48 pending third-party claims involving automobile accidents in Pennsylvania, with over $405,000 at stake. In addition, the Department is aware of 650 potential third-party claims involving automobile accidents in Pennsylvania, with more than $6 million at stake. The court of appeals' decision will preclude the government from recovering much of these amounts.[7] The potential for lost reimbursement within the Third Circuit could be even higher, depending on how the court of appeals applies its decision in the context of the New Jersey and Delaware no-fault statutes. The fiscal effect also would increase if the holding of the court of appeals were adopted in other circuits.

2. The practical difficulties that would result from the court of appeals' decision need not be suffered, because that decision is incorrect.

a. The starting point in construing a statute is the language of the statute itself. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reimbursement provision of the FECA, 5 U.S.C. 8132, states in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary * * * receives money or other property in satisfaction of that liability * * * the bene-

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[7] The government might be able to obtain reimbursement for some portion of FECA compensation it has paid in connection with Pennsylvania automobile accidents, but only to the extent of lost wages in amounts over $15,000, the required no-fault coverage level under the Pennsylvania No-Fault Act (and thus the point above which tort liability is preserved). Since the No-Fault Act provides for unlimited coverage of medical expenses, the government would be unable to recover any amount of FECA compensation it has paid for such expenses.

> ficiary * * * shall refund to the United States the amount of compensation paid * * *.

The Act unequivocally provides that when a FECA beneficiary has suffered an injury for which a third party is legally liable to pay damages, and the beneficiary recovers "money or other property" in satisfaction of that liability, the beneficiary must (after making certain deductions) apply that recovery to reimburse the compensation fund for the amount of FECA benefits received. Section 8132 does not indicate that the employee's duty to reimburse depends on whether the third-party recovery includes damages for medical expenses and lost wages. As the Sixth Circuit noted in *Ostrowski*, "[t]here is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties." 653 F.2d at 230, quoting 479 F. Supp. at 208.[8]

The legislative history of the FECA also does not suggest that Congress intended to require employees to reimburse the compensation fund only from amounts representing damages for medical expenses and lost wages. The predecessor of 5 U.S.C. 8132 was enacted in 1916, long before the advent of state no-fault statutes. But even then Congress recognized that the right of reimbursement would exist in the case of third-party recoveries with noneconomic components, such as puni-

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[8] The court of appeals here failed to note that the language of 5 U.S.C. 8132 differs from that of the reimbursement provision of the Medical Care Recovery Act, 42 U.S.C. 2651(a), construed by that court in *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (1980). Section 2651(a) refers to reimbursement from a third-party tort recovery of "damages therefor," a term the court in *Heusle* thought referred back to expenses for medical care, mentioned earlier in Section 2651(a). 628 F.2d at 837. We believe that the court in *Heusle* misconstrued Section 2651(a), but that in any event *Heusle* is distinguishable from this case because of the difference in wording of the FECA provision.

tive damages and "damages brought about by reason of mental pain and suffering." 53 Cong. Rec. 10909-10910 (1916) (remarks of Rep. Barkley). Congress surely was aware that there would be cases in which the government would not receive the full amount of benefits paid unless its right of reimbursement extended to the non-economic components of damages, perhaps because an employee would be unsuccessful in persuading a jury of the full measure of his economic losses, because his recovery was reduced based on the doctrine of comparative negligence, or because he settled for less than the full amount of his claim.

Reimbursement of the United States from an employee's third-party recovery, whether or not it includes damages for economic losses, is consistent with the purposes underlying 5 U.S.C. 8132. The court of appeals itself recognized (App. A, *infra*, 5a) that a major purpose of the reimbursement provision is to keep the compensation fund solvent and to minimize the overall cost of the FECA program.[9] That purpose clearly is served by requiring reimbursement from any element of an employee's damages award. The reimbursement provision also facilitates administration of the FECA program. As the district court in *Ostrowski* explained (479 F. Supp. at 205), "by having only one standard for establishing the obligation to reimburse, Congress has eased the burden of administering FECA by avoiding the difficulties of distinguishing between the numerous statutory and common law causes of action found in the various states." Application of a uniform federal reimbursement requirement is certainly less burdensome than interpretation of the FECA reimbursement provision to accommodate each variation of no-fault law on a state-by-state basis. See pages 8-10, *supra*.

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[9] See also *Dahn* v. *Davis*, 258 U.S. 421, 430 (1922); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953 & n.4 (2d Cir. 1975); *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d at 231.

The court of appeals found it significant that a third purpose of the reimbursement provision—prevention of double recovery by FECA beneficiaries—would not mandate reimbursement in the circumstances of this case (App. A, *infra*, 7a-8a). But the court recognized that Congress allowed the government to calculate reimbursement in light of an employee's total recovery in order to avoid confusion about the portion of an award or settlement figure that would be allocated to medical expenses and lost wages, as opposed to pain and suffering, and that courts had permitted reimbursement from all parts of an employee's damages award prior to the advent of no-fault statutes. See *id.* at 6a.[10] Thus, the court of appeals implicitly acknowledged that the gov-

[10] Prior to the no-fault cases, the only federal court that had addressed an argument that reimbursement under the FECA does not extend to portions of a recovery that represent non-economic losses had rejected the argument. In *United States* v. *Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966), cited by the court of appeals (App. A, *infra*, 6a), the employee contended that his settlement with a third-party tortfeasor represented only damages for pain and suffering. The court stated that the language of the provision (then 5 U.S.C. 777) "is clear and unambiguous, and makes no provision for the segregation or division of damages." 254 F. Supp. at 851.

The courts have reached the same result in interpreting the reimbursement provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. V) 933. See, *e.g.*, *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 350 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967); *Ballwanz* v. *Jarka Corp.*, 382 F.2d 433, 436-437 (4th Cir. 1967); *Chouest* v. *A&P Boat Rentals, Inc.*, 321 F. Supp. 1290, 1292-1293 (E.D. La. 1971), rev'd on other grounds, 472 F.2d 1026 (5th Cir.), cert. denied, 412 U.S. 949 (1973). Under state workers' compensation statutes, the prevailing rule (in the absence of any express provision to the contrary) permits workers' compensation carriers to seek reimbursement from the entire judgment recovered by an employee, whether or not part of the judgment represents damages for pain and suffering. See 2A A. Larson, *Workmen's Compensation Law* § 74.35, at 14-474 to 14-479 (1982), and cases cited therein.

ernment's right to reimbursement is not necessarily dependent on the need to avoid double recovery in a given situation.

The Secretary of Labor has long construed 5 U.S.C. 8132 to require reimbursement of the FECA compensation fund from any third-party recovery, regardless of the elements of damages that make up the recovery. The Secretary's regulation, 20 C.F.R. 10.503, promulgated to implement the reimbursement provision, provides that all damages a beneficiary recovers on account of an injury are available for reimbursement of the fund. That construction by the official responsible for administration of the FECA is entitled to considerable deference. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 10; *Miller* v. *Youakim*, 440 U.S. 125, 144 & n.25 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

b. The reasoning of the court of appeals in support of its construction of 5 U.S.C. 8132 cannot withstand scrutiny. The court in effect concluded that the reimbursement provision must be read out of the FECA in cases like this one in order to accommodate the operation of the Pennsylvania no-fault scheme. The court of appeals explained that it rejected the Secretary's interpretation of 5 U.S.C. 8132 "[i]n light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes" (App. A, *infra*, 7a).

The court of appeals' "reinterpretation" of the FECA is at odds with this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 11, quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980). In *Morrison-Knudsen*, the Court rejected the contention that employer contributions to union trust funds should be considered "wages" for purposes of computing com-

pensation benefits under Section 2(13) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(13). Although the Court recognized that such fringe benefits have come to constitute a significant percentage of compensation costs, it nevertheless held that alteration of the reasonable expectations of employers and their insurers is "a task for Congress." *Morrison-Knudsen*, slip op. 12, citing *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978). The Court noted that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other" and that reinterpretation of the term "wages" would significantly "alter the balance achieved by Congress." *Morrison-Knudsen*, slip op. 11. Likewise, the reimbursement provision plays a significant role in the balance Congress created under the FECA, and any "reinterpretation" of that provision to accommodate recent no-fault trends is the responsibility of Congress.

There is no support for the court of appeals' conclusion (App. A, *infra*, 8a) that Congress intended the result the court reached. The court of appeals cited a passage from the legislative history of the 1974 amendments to the FECA, in which the Senate committee indicated that enactment of those amendments would help the government achieve the position of "a model employer." S. Rep. 93-1081, 93d Cong., 2d Sess. 2 (1974), cited in App. A, *infra*, 8a.[11] But that rhetorical statement hardly suffices to support the conclusion that a court (as opposed to Congress) should revise the FECA to remedy what it perceives as an unfair result

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[11] The court of appeals appears to have erred in citing the Senate report. The court referred to "S. Rep. No. 1124, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341." App. A, *infra*, 8a. However, it is S. Rep. 93-1081 that is reproduced at page 5341 of 1974 U.S. Code Cong. & Ad. News.

of the operation of the federal statute in the context of a state no-fault scheme. Congress itself did not choose in 1974 to eliminate the reimbursement provision in connection with automobile accidents in no-fault states, despite the fact that a number of no-fault statutes had been enacted by that time.[12] Rather, Congress chose a more general approach to the problem of potential unfairness that employees might experience as a result of reimbursement. In order to mitigate any such unfairness, Congress amended 5 U.S.C. 8132 to provide that a FECA beneficiary is entitled to retain at least one-fifth of any net tort recovery (following deduction for costs and attorney's fees).[13] That amendment presumably was meant to remedy all sorts of unfairness, including any that might result from the operation of state no-fault laws; it seems quite inappropriate for the court of appeals to have invoked the legislative history of that amendment as support for creation of a different remedy.

It should be noted that, to the extent there is any unfairness to federal employees in cases like this one, it results not from the FECA reimbursement provision, which predates by more than half a century all state no-fault schemes, but from the operation of the state laws themselves. As the district court in *Ostrowski* stated (479 F. Supp. at 206):

> Any discrepancy between the net recovery of an employee whose injury is covered by a no-fault statute and an employee whose injury is covered by common law or statute using only traditional tort concepts results not from a classification made

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[12] By 1974, no-fault statutes had been enacted in Colorado, Connecticut, Florida, Hawaii, Massachusetts, Michigan, New Jersey, New York, and Utah.

[13] The question of respondent's retention of one-fifth of the net tort recovery does not even arise in this case, since the federal government is seeking reimbursement of only a small percentage of respondent's settlement.

> by the Congress in FECA, but rather from the decisions of the individual states regarding the proper means of compensating personal injuries.

Of course, states are free to change the relationships among various parties subject to state control, but they clearly cannot directly alter the rights of the federal government under a federal statute without running afoul of the Supremacy Clause of the Constitution, Art. VI, Cl. 2. It is likewise inappropriate for the courts to justify reading a provision out of a federal statute on the ground that a subsequently-enacted state statute does not mesh perfectly with the federal statutory scheme, as the court of appeals did here.[14] Any alteration of the FECA reimbursement provision to accommodate the effects of state no-fault schemes is a task for Congress alone.

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[14] In the absence of congressional action, any accommodation must be made through interpretation or alteration of *state* law. See, *e.g.*, *Perez* v. *Campbell*, 402 U.S. 637, 649-650 (1971); *Sperry* v. *Florida*, 373 U.S. 379, 384 (1963). Here, the Pennsylvania no-fault statute might reasonably be construed by the state courts not to require deduction of benefits paid under FECA (or other programs with mandatory repayment provisions over which the state has no control) from the no-fault insurers' obligation, to the extent the federal statute requires reimbursement from third-party recoveries for noneconomic losses. See *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. at 206.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1683

LORENZETTI, PAUL B.

Appellant

vs.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 82-1666

Argued April 28, 1983

Before: WEIS, HIGGINBOTHAM, *Circuit Judges*, and BROTMAN,* *District Judge*

Opinion filed June 22, 1983

OPINION OF THE COURT

BROTMAN, *District Judge:*

1. This case arises under the Federal Employment Compensation Act, 5 U.S.C. § 8101 *et seq.* (FECA). It is an action for a declaratory judgment brought by Paul B. Lorenzetti against the United States. The dispute stems from an unresolved conflict regarding the gov-

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*Hon. Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

ernment's right to reimbursement under the FECA and the injured party's ability to recover damages under the Pennsylvania no-fault statute, Pa. Stat. Ann. tit. 40, §1009.101 *et seq.* (Purdon 1974). The district court held that Lorenzetti was required to reimburse the government even though he had no third party cause of action for medical expenses and wage loss, exactly the items for which the government was responsible under FECA. *See* 5 U.S.C. §8132. The underlying issue is relatively straightforward—does §8132 compel a government employee who has received benefits under FECA to reimburse the government, even in cases where the beneficiary of such coverage is barred by state law from including in his third party action for damages medical expenses and wage loss?

2. The facts of this case are undisputed. Appellant Paul Lorenzetti, an FBI agent and government employee, was injured in an automobile accident on November 21, 1977. He suffered extensive injuries and was forced to miss work for several days. Pursuant to the provisions of FECA, the federal government immediately reimbursed appellant for all medical expenses and lost wages arising out of the accident. The total amount came to $1600.24.

3. Following the accident, appellant instituted a third party action for damages against the driver of the car with which he collided. At the outset of the lawsuit the defense moved to bar any evidence relating to medical expenses or wage losses, predicating the motion on the recently enacted Pennsylvania no-fault statute which precludes recovery on those grounds in any third party action.[1] As a result, appellant's damage claim was

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[1] The Pennsylvania No-Fault Motor Vehicle Insurance statute, Pa. Stat. Ann. tit. 40, § 1009.101 *et seq.* (Purdon 1974), reads in pertinent part as follows:

reduced to items of pain and suffering. He ultimately settled the case for $8500.00.

4. During the course of the third party action, the government appeared in the proceeding and asserted a subrogation lien against any recovery accruing to plaintiff. The government conceded, and the district court agreed, that the settlement was attributed solely to plaintiff's claim for pain and suffering. Nonetheless, the government still maintained that it was entitled to full reimbursement for its expenditures on Lorenzetti's behalf, pursuant to § 8132.[2] Appellant, on the other hand, refused to comply with the government's request, arguing that because he was barred from recovering dam-

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> Tort liability is abolished with respect to any injury that takes place in the State in accordance with the provisions of this Act if such injury arises out of the maintenance or use of a motor vehicle, except that:
>
> (5) A person remains liable for damages for noneconomic detriment (pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage ... § 1009.103 if the accident results in:
>
> (B) the reasonable value of reasonable and necessary medical and dental services ... in excess of $750 ...

Pa. Stat. Ann. tit. 40, § 1009.301(a)(5).

[2] The government concedes that under FECA appellant can deduct the portion of that amount which was used to pay his attorney's fees—in this case approximately $500.00. FECA reads in relevant part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury receives money or other property in satisfaction of that liability as the result of suit, or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States and credit any surplus on future payments of compensation payable to him for the same injury.

5 U.S.C. § 8132.

ages for medical expenses and lost earnings, he should not be required to reimburse the government for its expenditures for those items.

5. There is little argument as to the operation of this statute in most instances. The federal employee, if injured during the performance of his duties, is immediately entitled to payment for all related medical bills and is compensated for lost earnings. If he recovers damages as a result of that accident, the injured party must reimburse the government for its costs. *See e.g., United States v. Crystal*, 39 F. Supp. 220 (N.D. Ohio 1941). Typically, the refund will be subtracted from the employee's total damage award, regardless of whether the net amount allocated to medical expenses equals the cost incurred by the government with respect thereto. *See United States v. Hayes*, 254 F. Supp. 849 (W.D. Ky. 1966). The dispute in the instant action arises solely because Pennsylvania, the state in which the accident occurred, has recently passed a no-fault statute which bars an injured party from suing for medical expenses and/or lost wages. Pa. Stat. Ann. tit. 40, §1009.101 *et seq.* As a result of this bar, appellant was limited to an action exclusively for pain and suffering—he had no legal cause of action for other damages which may have resulted from the accident.

6. The government argues that § 8132 of FECA requires appellant to reimburse it for any expenses it incurred on his behalf. In this instance reimbursement is sought because the government contends that appellant did recover damages resulting from a legal liability created under the circumstances which led to the government's initial responsibility. 5 U.S.C. §8132. The district court concurred with the government's position and in doing so, it relied heavily on the reasoning employed by the court in *Ostrowski v. Roman Catholic Archdiocese, etc.*, 479 F. Supp. 200 (E.D. Mich. 1979), *aff'd* 653 F.2d 229 (6th Cir. 1981). After discussing the

language of the statute itself and noting the legislatively authorized interpretation rendered by the Secretary of Labor, 20 C.F.R. §10.503, the court in *Ostrowski* concluded that any damages recovered by the employee were subject to a government lien. *Id.* at 204. For the following reasons we reject the holding in *Ostrowski* and therefore, reverse the decision of the district court in the instant case.

7. The Federal Employment Compensation Act was enacted in 1916. The primary purpose of the law was to create a compromise: "the 'quid pro quo'—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate fixed benefits regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Lockheed Aircraft Corp. v. United States*, 51 U.S.L.W. 4206, 4207 (February 23, 1983); *see also* H.R. Rep. No. 729, 81st Cong., 1st Sess. 14-15 (1949); S. Rep. No. 836, 1st Sess. 23 (1949). Recently, when it was amending the statute, Congress clarified the purpose behind the law, explaining that "the Federal Government should strive to attain the position of being a model employer." S. Rep. No. 1124, 93rd Cong., 1st Sess. *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341. As such, it becomes quite evident that the statute was promulgated in an effort to assist the federal employee and to encourage able individuals to work for the government by providing favorable benefits.

8. The specific provision of the statute at issue in this action, 5 U.S.C. § 8132, was originally enacted for two basic purposes. First and foremost, Congress inserted §8132 in an effort to prevent an employee from recovering twice for the same injury. Pub. L. No. 267, §27, 39 Stat. 747-48 amended to 5 U.S.C. §8132 (1967). The other purpose behind the reimbursement section, was to keep the fund solvent and minimize the cost of the program. *See Ostrowski v. Roman Catholic Archdio-*

cese, supra at 205. Both of these objectives are advanced by the requirement set forth in §8132 that any employee who has been compensated by the government pursuant to FECA must subrogate his rights against a third party tort-feasor or reimburse the government for its past and future costs after receiving a damage award from the third party. 5 U.S.C. §8132.

9. Although the intent behind the statutory scheme is obvious, the scope of the reimbursement provision is less clear. When drafting the law, Congress recognized that third party judgments would often include monetary awards for losses other than medical expenses and lost wages. As a result, the statute was structured in such a manner as to allow the government to calculate the amount needed for reimbursement in light of the total recovery. *United States v. Hayes, supra.* The reason for lumping together all potential damages was to avoid further confusion as to the portion of an award or settlement figure which would be allocated exclusively to medical expenses and loss of wages, and that percentage attributable to other items such as pain and suffering. *See Ostrowski v. Roman Catholic Archdiocese, supra* at 206. In this instance both parties agree that the damages were solely compensation for appellant's pain and suffering. The government, however, seeks to reach into that award in order to obtain the desired reimbursement and in doing so, reads further into the statute than originally intended by Congress.

10. Unfortunately, §8132 was passed prior to the enactment of no-fault statutes and therefore does not speak to this situation. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look at the provisions of the whole law, and to its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Obviously, since the concept of no-fault insurance was not cognizable at the time the statute was drafted, Congress could not have anticipated

this scenario. If, as in this case, the problem is one that Congress could not have considered, this court is obligated to analyze the purposes underlying the statute in order to determine its proper scope. *Rose v. Lundy*, 455 U.S. 509, 517 (1982).

11. When it last amended FECA in 1973, Congress explicitly stated that it intended the law to insure "that injured or disabled employees of all covered departments or agencies ... be treated in a fair and equitable manner." S. Rep. No. 416, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341-43. The result now sought by the government converts a law which was originally intended to assist federal employees into one that is manifestly unfair to those same individuals. In light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes, it is incumbent on this court to reject the government's wide-ranging interpretation of §8132.

12. Moreover, requiring reimbursement under these circumstances does little to further the legislative purpose behind § 8132. Obviously, appellant cannot recover twice for the same loss since he is barred from bringing a third party action for medical expenses and lost earnings. In fact, because of his recovery under FECA, he is precluded from recovering any benefits to which he may have been entitled under no-fault insurance. 5 U.S.C. §8116(c); Pa. Stat. Ann. tit. 40, §1009.106(a). Nor is the intent to foster administrative ease advanced by the application of §8132 in this instance. Congress was troubled by the potential abuse that could occur if reimbursement was only deducted from the portion of the award allocated to medical expenses and wage loss. *See Ostrowski v. Roman Catholic Archdiocese*, *supra* at 205. The court in *Ostrowski* noted the problem, especially in settled cases, where parties would allocate a

disproportionate percentage of the award to pain and suffering. In this manner they would circumvent their obligation to reimburse the government. This problem would not exist in situations involving no-fault statutes since the injured party is completely barred from suing for any medical expenses incurred and therefore the only compensatory damages to which he is entitled are those resulting from his pain and suffering. Pa. Stat. Ann. tit. 40, §1009.301.

13. Another purpose of FECA, as pointed out earlier in this opinion, was Congress' hope that the law would help the federal government achieve its goal of becoming a "model employer." *See* S. Rep. No. 1124, 93rd Cong., 1st Sess. [*sic*], *reprinted in* (1974) U.S. Code Cong. & Ad. News 5341. In a realistic sense FECA is the government's answer to Workman's Compensation, *see* 5 U.S.C. §8107 (we note with interest that Workman's Compensation was first enacted in Pennsylvania three years prior to the passage of the FECA.), Pa. Stat. ann. tit. 77, §1 et seq. (1913). It should follow, therefore, that federal employees would be treated at least as well as their counterparts in private firms who are covered by Workman's Compensation. Under the proposed government interpretation, however, federal employees would be treated in a harsher manner than private workers who are covered by Pennsylvania Workman's Compensation law. In similar situations arising under Workman's Compensation, injured employees can institute a third party action for noneconomic detriment (pain and suffering) just as appellant did in the instant case. The difference, however, is that the Workman's Compensation statute does not require the successful party to reimburse the carrier for any expenditures made on his behalf, Pa. Stat. Ann. tit. 77, §736.

14. The rationale used by Pennsylvania courts when interpreting §736 of the Workman's Compensation

statute, is as follows: "[since] the Pennsylvania No-fault Act has drastically altered the legal liabilities created in a motor accident," *Pierce v. Kinsey*, 18 D&C 531, 536 (Pa. Comm. Pl. 1981), the Workman's Compensation carriers cannot be subrogees for money paid in a tort action covering noneconomic loss. *See Brunelli v. Farelly Bros.*, 402 A.2d 1058, 1061 (Pa. Super. Ct. 1979).[3] To permit subrogation by the intervenor insurance company for recovery of basic losses paid to plaintiffs under Workmen's Compensation payments would preclude recovery of the uneconomic losses suffered by plaintiffs." *Pierce v. Kinsey*, *supra* at 540. There is absolutely no reason in either the legislative history of FECA or in the interpretive regulations promulgated by the Secretary of Labor, as to why FECA cannot be viewed in an analogous fashion. Such a reading of §8132 would put federal employees on an equal footing with their counterparts in private industry and most importantly, it would allow for a fair result under the terms of the statute.

15. Finally, we are guided by this court's action when recently confronted with a similar statutory problem in *Heusle v. National Mutual Insurance Co.*, 628 F.2d 833 (3d Cir. 1980). The court in *Heusle* was faced with the issue of whether the no-fault carrier should be substituted for the actual tort feasor, so the government could recover against the insurer under §2651 of the Medical Care Recovery Act [MCRA]. *See generally*

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[3] This reasoning is analogous to that used by this court in its interpretation of the Medical Care Recovery Act (MCRA). 42 U.S.C. § 2651 (1976). *See Heusle v. National Mutual Insurance Co.*, 628 F.2d 833 (1980), (*see* discussion of *Heusle*, *infra*). The court in *Pierce*, however, focused on the crux of the problem, stating that "the real reason that the victim cannot subrogate himself for a second helping of basic loss benefits is not based on tort or contract concepts but on *unjust enrichment.*" *Pierce v. Kinsey*, *supra* at 537, n.2.

42 U.S.C. §2651-2653 (1976). Wording used in the provision permitting reimbursement under MCRA[4] is analogous to language used in §8132 of FECA. In analyzing MCRA, Judge Weis noted that the question of liability on the part of the third party tort feasor was ultimately determined by reference to the Pennsylvania no-fault statute. He then concluded "since there was 'no tort liability upon some person . . . to pay damages' for medical expense, then there was no claim in tort to which the United States could be subrogated under MCRA."[5]

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[4] Section 2651(a) reads in pertinent part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical or dental care and treatment . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have the right to recover from said third person . . . 42 U.S.C. § 2651(a).

[5] Section 8132 of FECA speaks in terms of "legal liability" rather than tort liability, however this decision does not rest on that language. Moreover, in the instant action, we turn to the regulations promulgated by the Secretary of Labor, regulations which have a binding effect on this court. *See* 5 U.S.C. § 8149. The regulations, in relevant part, read as follows:

> "if any injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages *therefor*, . . ."

20 C.F.R. § 1053 (emphasis added). One way of reading those regulations as they relate to the instant situation, is that appellant had no legal cause of action against a third party with respect to "the injury for which benefits are payable," namely medical expenses and lost earnings. *See* Pa. Stat. Ann. tit. 40 § 1009.301(a)(5) (Purdon Supp. 1980). In other words, the Pennsylvania law has impliedly created two separate causes of action; one for "basic economic loss" (as defined in § 1009.103) and another for "noneconomic detriment." (*See* § 1009.103.) Since appellant is barred from asserting the first cause of action, it follows naturally that the government must be precluded from recovering any expenditures made thereto. *See Heusle v. National Mutual Insurance Co., supra.* As such, the court would have no power under FECA to compel reimbursement based on the facts of this case.

Heusle v. National Mutual Insurance Co., *supra* at 837. In a companion case, *Hohman v. United States*, [6]28 F.2d 832, 833 (3d Cir. 1980), this court went even further, holding that the government's right of subrogation applies only to medical expenses and because none of the money recovered represents compensation for medical expenses, "the United States has no claim to any part of that fund." Both *Heusle* and *Hohman* clearly indicate that the courts must recognize the impact of state no-fault laws and interpret federal compensation statutes accordingly. As such, the reimbursement provision of FECA must be construed in such a fashion as to allow a fair and equitable result for the intended beneficiary of the statute—the injured federal employee.

16. For the reasons stated in this opinion, this court finds that appellant is not required to reimburse the government for expenditures made pursuant to its obligation under 5 U.S.C. §8101 *et seq.* (FECA). The decision rendered by the district court is hereby reversed.

A True Copy;
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1683

LORENZETTI, PAUL B., APPELLANT

v.

UNITED STATES OF AMERICA

(D.C. CIVIL No. 83-1666)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: WEIS and HIGGINBOTHAM, *Circuit Judges;* and BROTMAN, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 28, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 8, 1982, be, and the same is hereby reversed. Costs taxed against appellee.

ATTEST:

/s/ Sally Mrvos

SALLY MRVOS
Clerk

JUNE 22, 1983

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*Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OCTOBER 8, 1982

Civil Action
No. 82-1666

PAUL B. LORENZETTI

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

BECHTLE, J.

This is an action in which plaintiff seeks a determination that the United States may not assert a lien under the Federal Employees' Compensation Act for benefits previously paid to plaintiff, against plaintiff's recovery in a third party action. Presently before the Court are cross-motions for summary judgment. For the reasons which follow, defendant United States' motion will be granted and plaintiff's motion will be denied.

I.

In November, 1977, plaintiff Paul B. Lorenzetti was injured in an automobile accident in Pennsylvania in the course of and arising out of his employment with the federal government. Pursuant to the Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq.* (FECA), plaintiff received compensation benefits from the Federal Employees' Compensation Fund (Fund) for his medical expenses and lost wages.[1]

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[1] Benefits paid to the plaintiff by the Fund amounted to $1,600.24. After deduction of an allowance for attorney's fees under 5 U.S.C. § 8132, the parties agree that the amount at issue here is $1,044.38.

Subsequently, plaintiff initiated a civil action in state court against the driver of the automobile alleged to have caused the accident. Plaintiff sought damages for pain and suffering, medical expenses, and loss of earnings. Prior to trial, however, the defendant in that action correctly concluded that in view of the Pennsylvania No-Fault Act, Pa. Stat. Ann. tit. 40, §1009 *et seq.* (Purdon Supp. 1982-1983) (No-Fault Act), plaintiff was precluded from holding defendant liable for the $1,600.24 for medical expenses and lost wages which had been paid to plaintiff by the Fund under FECA. Thus, had the case gone to trial, plaintiff's proof of damages would have been limited to non-economic losses as defined by the No-Fault Act. The parties settled the case, however, for $8,500.00. In view of the applicable provisions of the No-Fault Act, the settlement must be attributed solely to plaintiff's claim for pain and suffering.

II.

Section 8132 of FECA requires that employees who recover damages from third parties for employment-related injuries compensable from the Fund reimburse the Fund out of their third party recovery. In the present action plaintiff seeks a declaratory judgment that the United States may not require reimbursement of the Fund out of plaintiff's third party settlement since the settlement is exclusively attributable to pain and suffering, a cause for which plaintiff received nothing under FECA.

Plaintiff relies on *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (3d Cir. 1980), a case decided under the Federal Medical Care Recovery Act, 42 U.S.C. §§2651-2653 (MCRA). In *Heusle*, a member of the armed forces was injured in an automobile collision and pursuant to MCRA received payments from the United States for medical expenses. The United States sought reimbursement from the injured service mem-

ber's no-fault carrier pursuant to the MCRA's subrogation provision which provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care ... to a person who is injured ... *under circumstances creating a tort liability upon some third person* ... to pay damages therefore, the United States shall have a right to recover from said third person....

42 U.S.C. §2651(a) (emphasis added).

In denying the United States' claim, the Third Circuit held that the United States was not entitled to recover, either from the tort-feasor or from the injured party's insurance carrier, the medical costs which the United States had disbursed to the injured party since the Pennsylvania No-Fault Act had abolished tort liability as a means of recovering the cost of medical expenses. Plaintiff in the present action seeks a similar interpretation of Section 8132 of FECA. That is, that like the MCRA, the FECA only requires government reimbursement to the extent that a third party recovery is attributable to the same type of benefits received under FECA. Based on such an interpretation of Section 8132, plaintiff argues that he is excused from the duty to reimburse the Fund out of his settlement award because under the Pennsylvania No-Fault Act tort actions in this state are limited to recovery of non-economic losses, and non-economic losses were not part of the benefits received under FECA.

The United States, on the other hand, resists plaintiff's interpretation of Section 8132. It adopts the view that plaintiff must reimburse the Fund to the extent of *any* damages paid by a third party to discharge a legal liability arising from the same injury, irrespective of the nature of those damages. As authority for its position, the United States cites *Ostrowski v. Roman Catholic Archdiocese of Detroit*, 653 F.2d 229 (6th Cir.

1981), affirming 479 F. Supp. 200 (E.D. Mich. 1979), wherein the precise question raised by the parties here was addressed by the Sixth Circuit. In the face of a state no-fault law similar to Pennsylvania's, the *Ostrowski* court interpreted Section 8132 to require plaintiffs to reimburse the Fund for economic benefits paid them under FECA out of damages awarded in a state court tort action against third parties for *non-economic* losses, i.e., pain and suffering. *Ostrowski* held that the modification in Michigan tort law caused by the adoption of a no-fault automobile insurance system did not prohibit the United States from obtaining reimbursement under Section 8132 of FECA. In reaching its conclusion, the court reviewed the language of Section 8132, which provides in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary ... receives money or other property in satisfaction of that liability ... the beneficiary ... shall refund to the United States the amount of compensation paid....

5 U.S.C. §8132.

As the district court in *Ostrowski* observed, *Ostrowski* v. *Roman Catholic Archdiocese of Detroit*, 479 F. Supp. 200, 203 (E.D. Mich. 1979), *aff'd* 653 F.2d 229 (6th Cir. 1981):

> There is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties.

Id.

In response to the United States' citation of *Ostrowski*, plaintiff Lorenzetti contends that this Court is bound by the Third Circuit's determination in

Heusle. The Court disagrees and declines to follow *Heusle* for the simple reason that the right of subrogation considered by the Third Circuit in that case under the Medical Care Recovery Act, is both different and narrower than the Federal Employees' Compensation Act right of reimbursement at issue here.

Plaintiff's argument that there is no meaningful distinction between the applicable "reimbursement" provisions of the two statutes ignores the fact that Congress chose to draft the provisions differently. FECA provides that the government shall be reimbursed, "If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a *legal liability* in [a third party] ... to pay damages, ... [and the injured person] receives money or other property in satisfaction of that liability...." 5 U.S.C. §8132 (emphasis added). In contrast, MCRA allows the government a right of subrogation against a third person as follows:

> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment ... to a person who is injured ... under circumstances creating a *tort liability* upon some third person ... to pay damages therefore,....

42 U.S.C. §2651(a) (emphasis added).

As a comparative reading of the two statutes clearly indicates, the government's recovery under FECA is all inclusive and is not limited to circumstances of tort liability. Moreover, additional support for a broad reading of the FECA reimbursement provision is found in the plain language of that provision's regulations, 20 C.F.R. §10.503, as well as its legislative history.[2]

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[2] The original Act, adopted in 1916, contained a reimbursement provision indistinguishable from 5 U.S.C. §8132. *See* Pub. L. No. 267, §27, 39 Stat. 747-748. The Congressional debates on Section 27 show that Congress was aware that third party re-

III.

In conclusion, this Court agrees with the well reasoned decision in *Ostrowski*, and holds that all FECA beneficiary recoveries from third parties give rise to a duty to reimburse the government irrespective of the nature of those third party recoveries. Thus, plaintiff's $8,500.00 settlement recovery in the third party action, which arose out of the same injuries for which plaintiff received FECA benefits, entitled the United States to reimbursement.

An appropriate Order will be entered.

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coveries would often include non-economic components such as pain and suffering, yet Congress made no attempt to shield these elements from the duty to reimburse. 53 Cong. Rec. 10909-10910 (July 12, 1916) (remarks of Rep. Barkley).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OCTOBER 8, 1982

Civil Action
No. 82-1666

PAUL B. LORENZETTI

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, TO WIT, this 8th day of October, 1982, for the reasons stated in the foregoing Memorandum, IT IS ORDERED as follows:

1. Defendant's motion for summary judgment is *granted* and plaintiff's cross-motion for summary judgment is *denied*;

2. Plaintiff is ordered to satisfy the lien of defendant United States of America in the amount of $1,600.24 pursuant to 5 U.S.C. §8132;

3. Judgment is *entered* in favor of defendant United States of America and against plaintiff Paul B. Lorenzetti.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE, J.

APPENDIX E

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Employees' Compensation Act, 5 U.S.C. 8131, provides:

> (a) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to—
>
> (1) assign to the United States any right of action he may have to enforce the liability or any right he may have to share in money or other property received in satisfaction of that liability; or
>
> (2) prosecute the action in his own name.
>
> An employee required to appear as a party or witness in the prosecution of such an action is in an active duty status while so engaged.
>
> (b) A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter.
>
> (c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of

the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.

(d) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in the Panama Canal Company to pay damages under the law of a State, a territory or possession of the United States, the District of Columbia, or a foreign country, compensation is not payable until the individual entitled to compensation—

(1) releases to the Panama Canal Company any right of action he may have to enforce the liability of the Panama Canal Company; or

(2) assigns to the United States any right he may have to share in money or other property received in satisfaction of the liability of the Panama Canal Company.

The Federal Employees' Compensation Act, 5 U.S.C. 8132, provides:

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of com-

pensation payable to him for the same injury. No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.

20 C.F.R. 10.503 provides:

If an injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, and, as a result of suit brought by the beneficiary or by someone on his or her behalf, or as a result of settlement made by him or her or on his or her behalf in satisfaction of the liability of such other person, the beneficiary shall recover damages or receive any money or other property in satisfaction of the liability of such other person on account of such injury or death, the proceeds of such recovery shall be applied as follows:

(a) If an attorney is employed, a reasonable attorney's fee and cost of collection, if any, shall first be deducted from the gross amount of the settlement;

(b) The beneficiary is entitled to retain one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settle-

ment have been deducted, plus an amount equivalent to a reasonable attorney's fee proportionate to any refund to the United States;

(c) There shall then be remitted to the Office, the benefits which have been paid on account of the injury, which shall include payments made on account of medical or hospital treatment, funeral expense, and any other payments made under the Act on account of the injury or death;

(d) Any surplus then remaining may be retained by the injured employee or his dependents, and the net amount of damages received by the beneficiary shall be credited against future payment of benefits to which the beneficiary may be entitled under the Act on account of the same injury or death.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, §1009.206(a) (Purdon Cum. Supp. 1983) (footnotes omitted), provides:

> Except as provided in section 108(a)(3) of this act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "life-time reserve" of benefit days) workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, §1009.301, (Purdon Cum. Supp. 1983) (footnote omitted), provides:

(a) **Partial abolition.**—Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that:

(1) An owner of a motor vehicle involved in an accident remains liable if, at the time of the accident, the vehicle was not a secured vehicle.

(2) A person in the business of designing, manufacturing, repairing, servicing, or otherwise maintaining motor vehicles remains liable for injury arising out of a defect in such motor vehicle which is caused or not corrected by an act or omission in the course of such business, other than a defect in a motor vehicle which is operated by such business.

(3) An individual remains liable for intentionally injuring himself or another individual.

(4) A person remains liable for loss which is not compensated because of any limitation in accordance with section 202(a), (b), (c) or (d) of this act. A person is not liable for loss which is not compensated because of limitations in accordance with subsection (e) of section 202 of this act.

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of diagnostic x-ray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750). For purposes of this subclause, the reasonable value of hospital room and board shall be the amount determined by the Department of Health to be the average

daily rate charged for a semi-private hospital room and board computed from such charges by all hospitals in the Commonwealth; or

(C) medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than sixty consecutive days; or

(D) injury which in whole or in part consists of cosmetic disfigurement which is permanent, irreparable and severe.

(6) A person remains liable for injury arising out of a motorcycle accident to the extent that such injury is not covered by basic loss benefits payable under this act, as described in section 103.

(b) Nonreimbursable tort fine.—Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, That such fine may not be paid or reimbursed by an insurer or other restoration obligor.